IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1945

No. 54

THE UNITED STATES OF AMERICA,
Petitioner,

vs.

JAMES M. RAGEN,
Respondent.

IN WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING ON BEHALF OF RESPONDENT, JAMES M. RAGEN

JOHN L. MCGINNIS,
Attorney for Respondent.

MATTHIAS CORYDON and
SIDNEY R. ZATZ,
Of Counsel.

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Petition for Rehearing.

Respondent, James M. Ragen, respectfully presents this, his petition for rehearing, in the above entitled cause, and in support of said petition, respectfully shows the following:

I.

There is insufficient evidence to connect James M. Ragen Sr. with any attempt or conspiracy to evade taxes.

In holding that Ragen, Sr. was connected with a scheme to evade income taxes of the Consensus Company for the

years 1933 to 1936 and a conspiracy to evade such taxes for the years 1929 to 1939, the court has overlooked the applicability of *United States* v. *Falcone*, 311 U. S. 205, to the facts of the case.

On this subject the court refers to the circumstance that from time to time until 1935, Ragen Sr. signed some "commission" checks (Opinion, p. 4) and in footnote 2 says that "because of this and other circumstances showing Ragen's continued participation in the affairs of Consensus," the argument that there was insufficient evidence to establish his connection with any scheme to evade taxes is without merit. It is submitted that the mere fact that Ragen signed some commission checks does not tend to prove that he was a party to any attempt or conspiracy to evade and defeat taxes. It was not the payment of these commissions which constituted the offense. The offense charged was the wilful attempt to evade taxes by taking deductions for these commission payments in Consensus' income tax returns or engaging in a conspiracy to do so. The evidence does not show that Ragen, Sr. had anything to do with the preparation, signing or filing of these returns, or that he ever knew the contents of any of them.

The only other evidence pertaining to Ragen Sr. is:

(1) Ragen Sr. was present at the original meeting with Annenberg in 1929 when it was agreed he was to receive 20% of the earnings of the run-down sheet business (R. 416). Nothing was said at this meeting about income taxes or any tax deductions.

(2) He received these sums until March 19, 1931 after which his son received a like amount and Ragen Sr. received nothing more (R. 426). After that date Ragen Sr. ceased to have any connection with the management of Consensus.

(3) During the time Ragen Sr. received 20% of the earnings, he received copies of the bookkeepers'

work sheets listing the commissions paid him under dividends (R. 413).

(4) Ragen performed services for the company until March 19, 1931. Brooks testified he talked to Ragen Sr. on the long distance telephone at various times regarding the business of the company (R. 354). Ragen saw to it that customers who had cut their orders for run down sheets reinstated them (R. 355). Ragen was head of the General News Service and had contacts enabling him to get run down business (R. 392). During the time Ragen Sr. was connected with Consensus its sales, limited in 1929 to 150 persons daily in St. Louis, (R. 321) were increased to $135,000 in 1930 (R. 21) and its operations were extended to other cities as well as St. Louis (R. 354, 365).

(5) Some time in 1934, 1935 or 1936, at the request of the company's attorney, he signed employment contracts for 1930 and 1931 and an assignment of the 1931 contract to his son (R. 381).

Ragen Sr. was never an officer or director of Consensus. He had nothing to do with its books or income tax returns (Ex. 1-9). He did not know the contents thereof, nor the deductions taken therein. None of the evidence shows that Ragen Sr. had anything to do with or any knowledge of the income tax affairs of the company. There is nothing to indicate that the Board of Tax Appeals' decision to which the court refers on page 3 of its opinion was ever discussed with James M. Ragen Sr., or that he knew anything about it. There is nothing to indicate that the basis upon which deductions were to be handled in the income tax returns of Consensus was ever discussed with Ragen Sr., or that he had any knowledge thereof.

The evidence discloses a business arrangement for the payment of a part of the earnings of Consensus to Ragen

and the carrying out of that arrangement. It had nothing to do with the company's tax liability. Ragen Sr. performed services under this arrangement and received the agreed compensation. There is nothing to indicate that Ragen knew there was any question of the deductibility of commissions involved, or even that the company was deducting commissions in its income tax returns. When he signed employment contracts for 1930 and 1931 and the assignment, he did so at the request of the company's attorney, and as far as he was concerned, the contracts merely evidenced his understanding of what had occurred. There is nothing to show that he knew that the contracts involved taxes in any way.

The court has ascribed to Ragen Sr. responsibility for the acts of all the defendants without any evidence to show that he knew of any conspiracy or became a party thereto. There was nothing to indicate to Ragen Sr. that any conspiracy existed to attempt to evade or defeat taxes. The holding of this court in *United States* v. *Falcone*, 311 U. S. 205, 210 that "these having no knowledge of the conspiracy are not conspirators", even though acts done by them may have furthered the object of the conspiracy is especially applicable here. Ragen Sr. had no knowledge of any conspiracy or any attempt to evade taxes. He had no knowledge of and no connection with the books or income tax affairs of the company. He therefore had no connection with the offenses charged.

It is fundamental law that in a criminal case, unless the evidence excludes every hypothesis except that of guilt, it is the duty of the court to direct a verdict for the defendant. *Nicola* v. *United States*, 72 F. (2d) 780, 786 (C.C.A. 3); *Dahly* v. *United States*, 50 F. (2d) 37, 43 (C.C.A. 8). The evidence as to Ragen Sr. was of such a character that a verdict should have been directed as to him.

II.

The evidence is insufficient to support a verdict that unreasonable payments were made for services rendered.

In support of its conclusion that there is evidence to support a verdict that unresonable payments were made for services rendered to Consensus, the court states that its business "according to the testimony of a person who was in immediate charge of its major operations" (referring apparently to the testimony of Gordon Brooks) "normally required only an hour and a half daily of managerial supervision", and "would hardly seem to call for additional executive services worth what Consensus paid in 'commissions'" (Opinion, p. 7). Reference to the testimony of Gordon Brooks shows that Brooks himself testified that he was not in charge of the major operations of the company (R. 354). He was a clerk who worked for Molasky in St. Louis, his work being, as he himself testified, "keeping the record of receipts and expenses which constituted most of the work", the preparation of "the weekly reports that Molasky sent to the Chicago office showing the receipts and disbursements" and supervision of the printing of the run down card at St. Louis (R. 351). It was upon that clerical work that Brooks testified he spent an hour and a half daily and three hours the day he made up the reports[1] (R. 351). There was no testimony that the business of the company required only an hour and a half daily of managerial supervision.

Apparently, the court was misled by answers Brooks, who was called as a Government witness, gave to leading questions on direct examination as to whether he did all the supervisory work (R. 352). However, on cross exami-

[1] The summary of Brooks' work contained on page 2 of the opinion is in accord with this statement.

nation, Brooks made it clear that the only supervisory work he did was with reference to printing the run down sheet at St. Louis, that the conduct of the rest of the business at St. Louis was all done by Molasky, who gave all the instructions, and that Brooks had nothing to do with the printing of the sheet at Cincinnati (R. 354, 355). In the absence of Molasky who frequently travelled to various cities opening up accounts for the company and was absent a large part of the time, Brooks called Chicago for instructions, talking to Ragen Sr., Ragen Jr., A. W. Kruse and Lester Kruse (R. 354, 355).

Brooks' testimony does not purport to state anything concerning the major operations of the company or the services rendered by the defendants. The evidence is clear that Brooks, a clerk in Molasky's St. Louis office, had little, if anything, to do with the major operations of the company which were conducted away from the office where Brooks was located. He was not in a position where he could know much about them. The major operations of the company centered about the sale of run down sheets in Cincinnati, Dayton, Louisville, Lexington, East St. Louis and Kansas City, as well as in St. Louis (R. 354, 355, 365). The company maintained offices in Chicago, where Ragen Sr. and Jr. were located, separate from the accounting office in Chicago, and out of this office men worked, going out to call on customers and doing other business for Consensus (R. 392). Molasky was in charge of the operations at St. Louis and often travelled on business of the company to Columbus, Louisville, Dayton and Lexington (R. 355). Molasky, together with A. W. Kruse and Ragen Sr. (succeeded in 1931 by Ragen Jr.) were executives of the company and managed its operations (R. 385, 388, 392). Molasky often came to Chicago or phoned Chicago and consulted Kruse and Ragen on matters of the company's business (R. 385, 392). Ragen Sr. (subsequently succeeded by Ragen Jr. (R. 394)) was head of the Gen-

eral News Service, which furnished information to bookmakers. A. W. Kruse was head of the Daily Racing Form, a racing publication (R. 392). By virtue of their position and contacts, these men were able to obtain run down business for Consensus (R. 392). That they did so is abundantly established by the fact that this business, unprofitable and selling to but 150 persons a day in St. Louis when they took it over in 1929, was extended under their management to Cincinnati, Lexington, East St. Louis, Dayton, Columbus, Kansas City and other places and attained sales reaching $212,562.00 yearly (R. 426). Sales, not Brooks' clerical work, constituted the major operations of the company. And as to sales, the record is uncontradicted that they were handled by and were under the supervision of the defendants to the benefit of the company.

In view of Brooks' limited participation and contact with the major activities of Consensus, the circumstance referred to in the opinion (page 7) that Brooks spoke to Lester Kruse but twice on the telephone and had not seen some of the recipients of commissions, throws no light upon the services that were performed by the defendants or the value of the services. They could be doing a great deal of work upon sales for the company and still Brooks, whose contact with all the defendants, except Molasky, was only by long distance telephone calls, would seldom have occasion to see them. Since Brooks would talk to Lester Kruse only if Ragen Sr., Ragen Jr. and A. W. Kruse were all out (R. 355), the circumstance that Brooks had but two conversations with Lester Kruse affords no indication as to what Lester was doing. Brooks did talk to Lester about some trouble in Louisville, where some one else put out a competing run down sheet (R. 355).

The evidence shows that the defendants procured and maintained sales for the company. For such work as

they did, they were entitled to reasonable compensation. But upon the record in this case no one can say what that reasonable compensation is, whether more or less than the sums paid them, because there is no evidence as to the nature and extent of the work so shown to have been rendered, or whether it constituted all of the services performed by them, or what the reasonable ...lue thereof was.

The circumstance referred to by the court that other salaries and wages were small [2] in comparison with commissions throws no light on the reasonable value of the services rendered by the defendants. In view of the large sales made by Consensus, if any inference at all is to be drawn from that circumstance, it is that the defendants themselves, rather than employees, procured the sales and did most of the other necessary work. Moreover further demonstrating that the salaries paid employees affords no criterion as to the work done by the defendants, the record shows several instances of services by employees rendered to Consensus which were charged to other enterprises conducted by the defendants. Brooks is such an instance (R. 352). The various bookkeepers and the company attorney, Kamin, are other instances (R. 321, 339, 352, 357, 371, 421).

The court calls attention to other circumstances which when taken together with Brooks' testimony, it considers as supporting a finding that unreasonable allowances were made for personal services (Opinion, page 8). Brooks' testimony, as we have shown, does not support such a finding. It is submitted that the other circumstances

[2] Page 8, footnote 6 of the opinion. Salaries and wages paid compared to commissions were not as small as the opinion of the court indicates. The year 1936 to which the court refers is not a typical year. Salaries and wages paid were much greater and commissions much lower in other years. (Ex. 1-8, Consensus Income Tax Returns.)

referred to—the uniformity of the distribution of 30% to Cecelia as dividends and 70% to the defendants as commissions, the payment of commissions in proportion to original stock holdings, and the destruction of the stock record and the writing of back dated employment contracts and stock certificates—as well fail to support a finding that unreasonable allowances were made for personal services. There is no necessary correlation between any of these circumstances and the reasonableness or unreasonableness of the compensation paid the defendants. All of these things could have happened and still the sums paid the defendants could be not in excess of reasonable compensation for the work done, depending on the services rendered. The only way in which the reasonableness of the compensation paid can be determined is by examining the nature, extent and value of the services rendered. These matters alone are determinative as to the reasonableness of the compensation. Where, as in the instant case, the facts as to those matters are not establishd by the evidence, there is no basis upon which such a determination can be made.

The opinion of the court states "there was evidence, which if believed, tended to establish that each defendant had performed some service, though of an irregular and undefined nature" (Opinion, page 4). The evidence was all that of the Government, the defendants having offered none and it was uncontradicted. It was incumbent upon the Government to establish that the sums paid for the services were unreasonable. Yet there was no evidence that the services shown were all the services rendered by the defendants and there was no evidence as to the amount of work performed or the reasonable value of such work, although the evidence, fragmentary though it was, did show that Consensus had received the benefit of valuable executive and sales services for which no one else but the defendants could have been responsible. On this state

of the record, it is respectfully submitted there is no substantial evidence to support a finding that the sums deducted as "commissions" were more than reasonable compensation for services rendered. Such a conclusion would rest upon conjecture or suspicion rather than evidence. Therefore, the convictions were without warrant and the judgment of the Circuit Court of Appeals should be affirmed.

III.

This court has sustained the convictions upon an issue which the Government contended was not involved until it came into this court and upon which the defendants have had no opportunity to present any evidence.

This court has upheld the verdict of the jury upon the ground that there is evidence sufficient to support a finding by the jury that the respondents wilfully attempted to make unreasonable allowances for personal services. As pointed out in the brief filed on behalf of this respondent, this is a principle which the Government, both in the trial and in the Circuit Court of Appeals, contended was not involved in the case. Until it came into this court, the Government consistently took the position that no question of reasonableness of the compensation paid was involved. The defendants, relying upon the Government's position, introduced no evidence as to the services rendered or the reasonableness of the compensation paid, but rested at the close of the Government's case. To uphold the convictions upon this issue is tantamount to denying the defendants an opportunity to present evidence thereupon. Upon this point, to avoid repetition, Respondent James M. Ragen adopts the argument contained in the petition for rehearing filed on behalf of Arnold W. Kruse and Lester A. Kruse (Cases Numbered 55 and 56).

Respondent, James M. Ragen, Sr., therefore respectfully prays that a rehearing be granted and that on such rehearing, the judgment of the Circuit Court of Appeals be affirmed.

Respectfully submitted,

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JOHN L. MCINERNEY,
Attorney for Respondent,
James M. Ragen.

MATTHIAS CONCANNON,
SIDNEY R. ZATZ,
Of Counsel.

Certificate of Counsel.

I, John L. McInerney, do hereby certify that I am the attorney for James M. Ragen, respondent in the above entitled cause, and that the above and foregoing petition for rehearing is presented in good faith and not for delay.

.....

JOHN L. MCINERNEY.